United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

74-2352

United States Court of Appeals

For the Second Circuit

WOMEN IN CITY GOVERNMENT UNITED, BARBARA ROBERTSON, LESLIE BOYARSKY, JACQUELINE GROSS, ARLENE FRIEDMAN, ROBERT SUSSMAN, ALICIA CANTELMI, PAMELA MILLS, SUSAN PASS, LINDA ZISES, EMILY BLITZ, SUSAN PADWEE, ELAINE JUSTIC, EULA CARTER, and LINDA SHAH, on behalf of themselves and others similarly situated,

Plaintiffs-Appellants,

—against—

THE CITY OF NEW YORK; ABRAHAM BEAME as MAYOR OF THE CITY OF NEW YORK; JOHN V. LINDSAY; HARRY BRONSTEIN, as CITY PERSONNEL DIRECTOR; NEW YORK CITY HEALTH AND HOSPITALS CORPORATION; NEW YORK CITY HOUSING AUTHORITY; NEW YORK CITY OFF-TRACK BETTING CORPORATION; JOSEPH MONSERRAT, SEYMOUR P. LACHMAN, ISAIAH E. ROBINSON, JR., MARY E. MEADE, Constituting the BOARD OF EDUCATION OF THE CITY OF NEW YORK; BLUE CROSS & BLUE SHIELD OF GREATER NEW YORK; GROUP HEALTH INCORPORATED; SOCIAL SERVICES EMPLOYEES UNION; SOCIAL SERVICES EMPLOYEES UNION WELFARE FUND; DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES; DISTRICT COUNCIL 37 HEALTH & SECURITY PLAN; UNITED FEDERATION OF TEACHERS; and UNITED FEDERATION OF TEACHERS WELFARE FUND,

Defendants-Appellees.

On Remand from the United States Supreme Court

PLAINTIFFS'—APPELLANTS' REPLY BRIEF

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TABLE OF AUTHORITIES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-2352

WOMEN IN CITY GOVERNMENT UNITED, BARBARA ROBERTSON, LESLIE BOYARSKY, JACQUELINE GROSS, ARLENE FRIEDMAN, ROBERT SUSSMAN, ALICIA CANTELMI, PAMELA MILLS, SUSAN PASS, LINDA ZISES, EMILY BLITZ, SUSAN PADWEE, ELAINE JUSTIC, EULA CARTER, and LINDA SHAH, on behalf of themselves and others similarly situated,

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Defendants-Appellees.

ON REMAND FROM THE UNITED STATES SUPREME COURT

PLAINTIFFS'-APPELLANTS' REPLY BRIEF

Plaintiffs submit this Brief in Reply to the seven

separate briefs of defendants. [1]

The sole task of the court in this proceeding is to give "further consideration" to its previous decision "in light of" General Electric Co. v. Gilbert, 429 U.S. ___, 97 S.Ct. 401 (1976) ("Gilbert"). [2] Defendants' briefs do not contain a single substantial argument as to why Gilbert requires a different decision from that previously reached by the court. Instead, defendants attempt to raise anew a welter of arguments which have no relation whatever to Gilbert and which were rejected by this court two years ago. Consequently, the court should either reinstate its previous judgment or issue a new judgment reversing the order of the district court.

1/ References will be made to defendants' briefs as follows: District Council 37 Health & Security Plan ("DC 37 Fund Brief"); District Council 37, American Federation of State, County & Municipal Employees ("DC 37 Brief"); United Federation of Teachers and United Federation of Teachers Welfare Fund ("UFT Brief"); Social Service Employees Union Local 371 and Social Service Employees Union Local 371 Welfare Fund ("SSEU Brief"); Blue Cross and Blue Shield of Greater New York ("Blue Cross Brief"); Group Health Incorporated ("GHI Brief"); The City of New York; Abraham Beame, as Mayor of the City of New York; Harry Bronstein, as City Personnel Director; New York City Health & Hospitals Corporation; New York City Off-Track Betting Corporation; Joseph Monserrat, Seymour P. Lachman, Isaiah E. Robinson, Jr., Mary E. Meade, constituting the Board of Education of the City of New York("City Brief"); derendant New York City Housing Authority did not submit a brief.

2/ Order of the Supreme Court dated January 10, 1977.

I.

In this section we take up some of the defendants' arguments that bear upon the issues involved in Gilbert. The others require no reply.

1. Contrary to defendants' intimations, a majority of the court in Gilbert specifically affirmed that there will be no backtracking from the rule that claims of discrimination under Title VII are measured by the impact and effects of the challenged plans and policies (concurring opinions of Justices Stewart and Blackmun and dissenting opinions of Justices Brennan, Marshall and Stevens). 3/

2. Defendants DC 37 and DC 37 Fund, UFT and SSEU argue that plaintiffs may not proceed to prove impact because impact is not alleged in the complaint, because plaintiffs did not elect to replead prior to the district court's sua sponte dismissal, and because the impact theory of proof was not urged upon the district court (DC 37 Br., 15 ff.; DC 37 Fund Br., 14 ff.; UFT Br., 14 ff.; SSEU Br., 18).

3/ Defendants' assertions notwithstanding (SSEU Brief at 18, 40-43) neither Gilbert, Griggs v. Duke Power Co., 401 U.S. 424 (1971), nor Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1973), hold that intent to discriminate is an essential element of a claim under Title VII since the statute is directed as the "consequences of employment practices." Griggs v. Duke Power Co., supra at 432; Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1377 (5th Cir. 1974), Gates v. Georgia Pacific Corp., 492 F.2d 292, 295 (9th Cir. 1974), Kober v. Westinghouse Electric Corp., 480 F. 2d 240, 245-46 and cases cited therein (3d Cir. 1973).

With respect to the first argument, defendants confuse the ultimate fact to be proved -- discrimination -- with the evidence to be used to prove it. It is not necessary that plaintiffs plead their evidence (Conley v. Gibson, 355 U.S. 41, 47 (1957), or for that matter the legal theory under which they are proceeding, Siegelman v. Cunard White Star, 221 F.2d 189, 196 (2d Cir. 1955). 4/

The complaint alleges that defendants have discriminated against plaintiffs because of sex by excluding pregnancy from fringe benefit plans. (See, e.g., Complt. ¶ 51 (28a).) There can be no doubt that the defendants had notice of the nature of plaintiffs' claims that women were not getting a fair share of benefits at all stages of the action. Defendants themselves acknowledge that plaintiffs pressed the specific argument raised here more than two years ago during the first appeal (DC 37 Br. at 18, fn.). No defendants have suggested that there has ever been any question or confusion as to what this case is about. In any event, even if defendants' argument were well taken, this court should remand giving plaintiffs the opportunity to amend the complaint.

4/ Indeed the district court stated that as a matter of pleading he considered the complaint to comprehend and permit proof that defendants' pregnancy classification was pretextual. (300a). Similarly, the complaint is broad enough to permit proof that the plans have an adverse impact upon women generally.

With respect to the repleading argument, the record shows that plaintiffs were given an opportunity to replead only to allege invidious intent by the defendants (242a, 254a). That plaintiffs did not elect to do so has no bearing on their right to prove discrimination by showing disparate impact.

Equally unavailing is the argument that plaintiffs failed to present the impact theory of proof to the district court. Under the law as it stood when the case was in the district court -- more than two years ago -- plaintiffs expected that discrimination would be inferred from the mere existence of the pregnancy classifciation. Now, after Gilbert, plaintiffs must prove that women as a group fare worse than men under the plans.

This alteration of the mode by which plaintiffs propose to establish discrimination -- brought about as it was by a major intervening Supreme Court decision -- does not bring into play the rule that appellate courts often refuse to consider issues raised for the first time on appeal. That rule normally applies only to appeals after trial on the merits. See, e.g., Terkildsen v. Waters, 481 F.2d 201 (2d Cir. 1973); Fortunato v. Ford Motor Co., 464 F.2d 962 (2d Cir. 1972), cert. den. 409 U.S. 1038 (1972), cited by DC 37 at pp. 17 and 18. Even then the rule is discretionary and it is rarely if ever applied to bar presentation of a purely legal question like

that involved here. Cf., Foster v. United States, 329 F.2d 717, 718 (2d Cir. 1964), North American Leisure Corp. v. A&B Duplicators, Ltd., 468 F.2d 695, 699 (2d Cir. 1972).

It would be manifestly unfair not to consider plaintiffs impact argument, in light of the narrow focus of the hearing below and the rapidly changing state of the law in this area. Cf., Martinez v. Mathews, 544 F.2d 1233, 1237 (5th Cir. 1976); Briscoe v. Levi, 535 F.2d 1259, 1277 (D.C. Cir. 1976) cert. granted ___U.S.___, 97 S.Ct. 522 (1976). Consideration of the issue is essential if this court is to discharge its obligation to ensure that no complaint is dismissed in limine unless it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, supra, 355 U.S. at 45-46.

3. GHI argues that plaintiffs are foreclosed from pursuing Fourteenth Amendment sex discrimination claims (GHI Br., 14 ff.), but this argument misses the point of plaintiffs' position in their principal brief. Plaintiffs no longer pursue a Fourteenth Amendment theory of "sex discrimination" in the sense of discrimination against all women, but such discrimination is not the only thing proscribed by the Fourteenth Amendment. Plaintiffs now focus upon more narrow and simple consti-

tutional grounds comprehended by the complaint, namely that defendants' plans impose an impermissible burden on the exercise of the right of procreation and arbitrarily discriminate against pregnant women who suffer medical complications in connection with pregnancy (Pl. Br. at 20 ff.). Defendant GHI nowhere addresses these issues, nor for that matter do the other defendants against whom this claim is raised (the City defendants, the insurance companies and the unions).

II.

1. The various defendants raise a hodge-podge of arguments which have no relation to the issues involved in Gilbert. All but one of these arguments were rejected when the case was here before, and therefore they should not even be considered in this proceeding. While the Supreme Court's order requires consideration here of the possible effects of Gilbert, neither that order nor anything else requires laborious reconsideration of previously rejected arguments which are completely unrelated to Gilbert. Indeed, such reconsideration would be contrary to basic principles of finality.

Consequently, we do not set forth here the extensive argument which would be required to respond to defendants' numerous irrelevant points. However, after this court's prior remand, defendants raised these points anew on motions for dismissal and summary judgment in the district court, and plain-

tiffs submitted briefs demonstrating that all are insubstantial. These briefs, which contain our most recent research on these issues, are part of the present appellate record and are available to this court. 5/

5/ Although it seems most unlikely that the court will wish to review these arguments, the following table is provided, correlating the extraneous arguments in defendants' current briefs with the portions of their 1975 briefs in this court where the same arguments were raised, and with the responsive portions of plaintiffs' more recent brief below (dated June 26, 1975, item 75 of the index to the supplemental record on appeal):

		Defendants' Current Brief	Defendants' 1975 Brief	Plaintiffs' Dist.Ct.Br.
City	pp.	13-15	21-23	32-35
City	pp.	16-19	14-16	22-24
City	pp.	19-21	24-27	28-30
Blue Cross	pp.	7-10	18	12-18
Blue Cross		6,10-12	17,21	25-27,46-49
GHI	pp.	7-13	6-8	12-18,25-27, 46-49
UFT	pp.	18-19	17-21	52
UFT	pp.	20-25	18-21	49-50
UFT	pp.	26-27	22	10-12
UFT	pp.	28-32	23-26	42-47,51-52
SSEU	pp.	20-21	8	13-16,34-46
SSEU	pp.	22-26	9	3-7, 49-50
SSEU	pp.	27-28	13	7-11,10-12
SSEU	pp.	29-35	14	17-34,42-47, 51-52
SSEU	pp.	44-46	26	

2. There is one issue which is unrelated to Gilbert and which was not raised when this case was previously here.

The City defendants argue that plaintiffs' claim for forced maternity leave is barred by the judgment, rendered after this court's order remanding this case, in Monell v. Department of Social Services, 394 F.Supp. 853 (S.D.N.Y. 1975), aff'd 532 F.2d 259 (2d Cir. 1976), cert. granted 97 S.Ct. 807 (1977) ("Monell"). 6/ This argument lacks merit.

Monell was designated in 1972 as a class action pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure. 357 F.Supp. at 1054. 7/ Rule 23(c)(2) provides that notice

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6/ The related issue regarding mootness is fully treated in our main brief at 15-16. This discussion applies as well to the mootness argument urged by defendant SSEU (Br. at 44 ff.) on the ground that its disability plan now covers pregnancy. However, so long as plaintiffs are entitled to damages for discrimination under the previous plan, the action is not moot. Roberson v. Harder, 440 F.2d 687, 688, n.1. (2d Cir. 1971).

7/ While the district court did not specify a subdivision of Rule 23(b), it is clear from the court's discussion that the class is a class as described in subdivision (3). As a basis for designating the action as a class action the court made findings which are relevant only to a (b)(3) class, e.g., that questions of law or fact common to members of the class predominate over questions affecting only individual members and that a class action is superior to other available methods of adjudication. 357 F.Supp. at 1054. Moreover, the Monell case, seeking as it did damages on behalf of numerous plaintiffs with varying claims, could not have been maintained under any subdivision of Rule 23(b), except for subdivision (3).

must be directed to members of such class, advising them among other things that they may opt out of the action if they wish. Rule 23(c)(3) provides that the judgment in such a class action shall "include and specify and describe" those to whom the notice was directed "and who have not requested exclusion."

In Monell no notice was directed to purported class members as required by Rule 23(c)(2). 8/ The court in that case was therefore unable to and did not comply with Rule 23 (c)(3).

It follows that nobody is barred by the judgment in Monell except the named plaintiffs in that case, none of whom is a named plaintiff here. This conclusion is required both by Rule 23 and by due process.

When a judgment in a purported class action is raised as a bar in a subsequent action by absent class members, it becomes the court's duty "to examine the course of procedure in both litigations to ascertain whether the litigant whose

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8/ We are so informed by counsel for plaintiffs in Monell. They inform us that a dispute arose between the parties as to who should bear the cost of the notice and, before the dispute was resolved, the district court dismissed the action. There is no adequate factual record on this issue in the present case case because the district court judgment in Monell came down after this action was dismissed and therefore the Monell judgment was not set up as a ground for the dismissal order under review here. Indeed if there is factual controversy concerning notice to class members in Monell, it may be resolved by the district court after remand.

rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes." Hansberry v. Lee, 311 U.S. 32, 40 (1940). At a minimum, due process requires that no absent class members be barred by a judgment obtained without compliance with the notice and other protective provisions of Rule 23. Stated more fundamentally, in a sprawling class action like Monell it is manifestly unfair to permit a judgment of dismissal to bar the disparate claims of tens of thousands of individuals who did not receive the prescribed notice and had no opportunity to opt out as required by the rule. The present named plaintiffs, for example, would amost certainly have opted out and pressed this independent action had they received an opportunity to do so as guaranteed by the rule.

Even if the present plaintiffs were within the ambit of the Monell judgment, they would not be barred from litigating here their entitlement to back pay because of forced leaves imposed after the 1972 amendment of Title VII. The Monell plaintiffs were not permitted to litigate this issue because none of the alleged acts of discrimination against the named plaintiffs occurred after the 1972 amendment. 532 F.2d at 261. While neither this court nor the district court discussed the point at length, they apparently took the view that the Monell named

plaintiffs lacked standing to litigate the issue of post-amendment forced leaves.

It is elementary that a prior judgment is conclusive upon its parties only to the extent of issues which either were actually litigated or which might have been litigated. See generally, 1B Moore's Federal Practice, pp. 1153 n.9 and 1163 n.6 (1974, and cases there cited. In Monell the post-amendment issue was not litigated and, under this court's holding in that case, it could not have been litigated by the Monell plaintiffs. It follows that on that issue the judgment is no bar even as to the Monell named plaintiffs.

CONCLUSION

For the reasons stated above and in plaintiffs' principal brief this court should adhere to its previous order.

Dated: New York, New York
June 1, 1977

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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WOMEN IN CITY GOVERNMENT UNITED, et al., :

Plaintiffs-Appellants, : Docket No. 74-2352

-against- :

THE CITY OF NEW YORK, et al. : AFFIDAVIT OF SERVICE BY MAIL

Defendants-Appellees. :

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

The undersigned, being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age, and resides at 101 West 80th St., New York, N. Y. 10024.

That on May 27, 1977, deponent served the annexed Plaintiff-Appellant's Reply Brief upon:

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August DeFonse

AUGUST DE FONSE

Sworn to this 27th day

of May, 1977.

George Cohen

GEORGE COHEN
Notary Public, State of New York
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Qualified in New York County
Commission Expires March 30, 1979